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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1453

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles,
APPELLANTS

V.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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APPELLANTS

v.

GEORGE MAYNARD and MAXINE MAYNARD,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

The Appellants appeal from the judgment of the United States District Court for the District of New Hampshire, entered on January 9, 1976, holding unconstitutional a statute of the State of New Hampshire

and granting injunctive relief to the Appellees, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of New Hampshire, rendered on January 9, 1976, by a three-judge District Court, is not yet reported. A copy of that opinion is attached hereto as Appendix A.

GROUNDS OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253, this being an appeal from an order of a three-judge District Court granting, after notice and hearing, a permanent injunction in a civil action. The action was instituted by the Appellees pursuant to 42 U.S.C. §1983, seeking declaratory and injunctive

relief against the enforcement of a statute of the State of New Hampshire on the grounds of its unconstitutionality. The action, therefore, was required to be heard and determined by a District Court of three judges, pursuant to 28 U.S.C. §2281.

The Appellants seek review of the order of the three-judge District Court, entered on January 9, 1976, holding unconstitutional New Hampshire RSA 262:27-c (supp), which makes it a misdemeanor to obscure the words "Live Free or Die" on New Hampshire State license plates. Timely notice of appeal to this Court was filed with the United States District Court for the District of New Hampshire on February 13, 1976. A copy of the Notice of Appeal is attached hereto as Appendix B.

As the three-judge District Court held unconstitutional New Hampshire RSA 262:27-c (supp) and granted injunctive relief, this matter is appropriately brought to this Court by appeal pursuant to 28 U.S.C. §1253. Loeb vs. Trustees of Columbia Township, 179 U.S. 472 (1900) (constitutionality); Sixty-Seventh Minnesota State Senate vs. Beens, 406 U.S. 187 (1972) (constitutionality and injunctive relief); St. John vs. Wisconsin Employment Relations Board, 340 U.S. 411 (1951) (injunctive relief).

This case involves the First and Fourteenth Amendments of the Constitution of the United States and New Hampshire. RSA 262:27-c (supp) and 263:1 (supp), which are set forth in Appendix C.

QUESTIONS PRESENTED

I. WHETHER FEDERAL INTERVENTION IN A STATE CRIMINAL PROCEEDING IS PRECLUDED WHERE THE DEFENDANT THEREIN HAS HAD A FULL OPPORTUNITY TO UTILIZE STATE APPELLATE REMEDIES AND HAS FAILED TO DO SO.

II. WHERE, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE STATE OF NEW HAMPSHIRE MAY PROHIBIT BY CRIMINAL SANCTION THE KNOWING OBSCURATION OF THE WORDS "LIVE FREE OR DIE" ON NEW HAMPSHIRE MOTOR VEHICLE LICENSE PLATES.

STATEMENT OF THE CASE

The Appellees, George and Maxine Maynard, are husband and wife and residents of Claremont, New Hampshire. They own two non-commercial motor vehicles, a 1971 Toyota and a 1968 Plymouth, both of which are registered in the State of New Hampshire. Pursuant to New Hampshire RSA 263:1 (supp), four non-commercial motor vehicle license plates which bear the State Motto "Live Free or Die" were issued to the Appellees for their motor vehicles. In March or April of 1974, the Appellees began placing non-transparent tape over the State Motto, and in May or June of that same year, Mr. Maynard punched out the words "or Die" on all four license plates, covering the resulting holes, as well as the words "Live Free," with non-transparent tape.

On November 27, 1974, Mr. Maynard was charged by a Lebanon, New Hampshire District

Court complaint with having committed the misdemeanor offense of Misuse of Plates, contrary to New Hampshire RSA 262:27-c (supp), in that he knowingly attached to one of his motor vehicles license plates having been duly issued by the State Director of Motor Vehicles, but on which he knowingly had obscured or permitted to be obscured the words "Live Free or Die." Mr. Maynard was found guilty by the Lebanon District Court on December 6, 1974, and was ordered to pay a fine of $25.00, which fine was suspended. Mr. Maynard did not appeal this conviction.

By a Lebanon District Court complaint dated December 28, 1974, Mr. Maynard was charged with a second violation of New Hampshire RSA 262:27-c (supp). He was found guilty on January 31, 1975, was sentenced to pay a fine of $50.00 and was ordered sentenced to the Grafton County,

New Hampshire House of Correction for six months, which imprisonment was suspended. Mr. Maynard again did not appeal the conviction and, moreover, advised the District Court that he would refuse to pay the fines, now totalling $75.00, as a matter of conscience and not due to an inability to pay. The District Court then ordered that Mr. Maynard be committed to the House of Correction for fifteen days. Mr. Maynard served his sentence and was released on February 15, 1975.

Prior to his trial on the second complaint, Mr. Maynard was charged on January 3, 1975, with a third violation of New Hampshire RSA 262:27-c (supp). He was found guilty by the Lebanon, New Hampshire District Court on January 31, 1975, but the case was continued for sentence. Again, Mr. Maynard failed to appeal his conviction.

In his defense at the time of trial of each complaint, Mr. Maynard argued that his acts with respect to the license plates were the result of his personal religious convictions.

On March 4, 1975, the Appellees filed with the United States District Court for the District of New Hampshire a civil complaint for declaratory and injunctive relief, naming as defendants the Appellants herein, Neal R. Wooley, individually and as Chief of Police, Lebanon, New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; and Frederick N. Clarke, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles. Alleging that both New Hampshire RSA 263:1 (supp) and New Hampshire RSA 262:27-c (supp) are unconstitutional, the Appellees sought preliminary and permanent injunctive relief restraining

the Appellants from enforcing the provisions of said statutes. By amended complaint dated March 7, 1975, Appellees requested further that a three-judge District Court be convened pursuant to 28 U.S.C. §2281. On March 11, 1975, United States District Court Judge Hugh H. Bownes issued a temporary restraining order against the Appellants and granted the Appellees' request for the convening of a three-judge District Court. Thereafter, briefs were submitted by the parties and on September 22, 1975, the three-judge District Court held an evidentiary hearing and heard oral arguments. The decision of the Court was rendered and entered on January 9, 1976.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the three-judge United States District Court, holding unconstitutional New Hampshire RSA 262:27-c (supp) as applied in this case, presents questions so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution by this Court.

I. Whether federal intervention in a state criminal proceeding is precluded where the defendant therein has had a full opportunity to ulitize state appellate remedies and has failed to do so.

The importance of the first question raised in this case derives from the historical and fundamental policy against federal interference with the criminal processes of state courts. Younger vs. Harris, 401 U.S. 37 (1971). Appellee Mr. Maynard was prosecuted within a state court for three separate and distinct violations of the same state criminal

statute. In each case he based his defense upon the First Amendment, which defense expressly raised the issue of the constitutionality of the state statute. (Transcript of three-judge Court, p. 22). In each case his defense was found by the Trial Court to be without merit. Under the two-tier trial system of New Hampshire, Appellee Mr. Maynard in each case had either the absolute right to appeal and a trial de novo. (New Hampshire RSA 502-A:11; State vs. Handfield, 115 N.H. ____, 348 A.2d 352 (1975)) or the right to request the Trial Court to reserve and transfer to the New Hampshire Supreme Court any issues of constitutional law raised by him in the Trial Court. (New Hampshire RSA 502-A:17-a (supp)). However, on three separate occasions he elected not to avail himself of either remedy and the attendant opportunities to renew his constitutional claims. His failure to exhaust

his state appellate remedies precludes federal intervention. Huffman vs. Pursue, Ltd., 420 U.S. 592 (1975); Kugler vs. Helfant, 421 U.S. ____, 44 L. Ed. 2d 15 (1975). Intervention such as that which occurred in the instant case not only acts to nullify the prior state court proceedings, but also constitutes a collateral attack upon the state court convictions. Cardillo vs. Zyla, 486 F.2d 473 (1st Cir. 1973). And where the subject matter of the instant case relates to the entire motor vehicle registration system of the State of New Hampshire, the principles of equitable restraint and comity deserve the strictest adherence.

II. Whether, consistent with the First and Fourteenth Amendments of the United States Constitution, the State of New Hampshire may prohibit by criminal sanction the knowing obscuration of the words "Live Free or Die" on New Hampshire motor vehicle license plates.

Approximately 325,000 motor vehicle license plates currently issued by the State of New Hampshire bear by legislative act the State Motto, "Live Free or Die." (Transcript, p. 57). The placement of these words upon license plates serves not only in part to designate a motor vehicle as being registered in this State, but also, pursuant to the motor vehicle registration system of this State, purposely functions as a means of identification of a particular class or use of motor vehicles. (Transcript, p. 63, pp. 68-71). The placement of the State Motto on license plates also serves to foster appreciation of State history and tradition, to create State pride, identity and individualism,

and to promote tourism, the latter being the largest source of financial revenue to New Hampshire. All these purposes clearly are within the police power of a state. Halter vs. Nebraska, 205 U.S. 34, 31, 51 L. Ed. 696, 701 (1907). And New Hampshire RSA 262:27-c (supp), which makes it an offense to obscure any portion of a duly issued license plate, is a reasonable manner of promoting the State's general welfare and of sustaining a substantial governmental interest, that is, a uniform system of motor vehicle registrations and identification. State vs. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).

In holding this statute unconstitutional as applied, the three-judge Court below relied upon Spence vs. Washington, 418 U.S. 405 (1974), and Tinker vs. Des Moines Independent Community School District, 393 U.S. 503 (1969). Likening

the obscuration of the words on a license plate to the taping of a peace symbol on a flag in Spence, the Court below discovered symbolic speech. The analogy fails. While the conduct in Spence and Tinker derived its communicative quality from the then emotional Vietnam conflict and further in Spence from the object of the conduct, i.e., the flag, the conduct of the Appellees herein was not undetaken against any background which gave it meaning and, moreover, was directed upon an object having not only an ambiguous meaning, but also symbolic significance far less than that of the flag. Contrary to the implication of footnote 11 of the Opinion below, there is no evidence in the record of individuals other than the Appellees, since State vs. Hoskin, supra, engaging in similar conduct. This, coupled with the ambiguity of the meaning of the State Motto, causes an observer of the conduct of

the Appellees to reach no interpretation other than that of "bizarre behavior" (Spence, supra, p. 410) in the realm of that "apparently limitless variety of conduct (which cannot) be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States vs. O'Brien, 391 U.S. 367, 376 (1968). The Court below acknowledged that "the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy." Such an act is essentially just that - "pure whimsy," and the crucial distinction between such "bizzare behavior" or "pure whimsy" and constitutionally protected symbolic speech escaped the Court. The meaning of a symbolic act must be that which is communicated at the moment of the act and it is error to permit a whimsical act subsequently to be imbued with meaning by the

testimony of the actor. Such a post facto effort to give a communicative quality to an otherwise uncommunicative act cannot trigger First Amendment protection. By their conduct the Appellees clearly did not communicate "fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage." (Opinion below). Neither can it be said that the Appellees communicated a "strong disagreement with implications of the message" (Opinion below) since the message of the State Motto is ambiguous. There was no "particularized communication" and no great likelihood of any message being understood. Spence, supra, p. 411.

Any ideas intended to communicated by the Appellees at the moment of their conduct were particularized from the witness stand eighteen months after their conduct. (Transcript, p. 10f).

A majority of the states utilize motor vehicle license plates bearing state mottoes or other slogans, for example: North Carolina: "First In Freedom"; Oklahoma: "Oklahoma Is OK"; Nebraska: "Cornhusker State"; Wisconsin: "Dairyland". (Defendants' Exhibit No. 7, below). The substantial importance of the issues raised in this case, therefore, is not restricted to New Hampshire, but is of general importance, affecting the motor vehicle registration systems in numerous states. (See, e.g., Froslid vs. Hults, 248 N.Y.S.2d 676, 20 A.D.2d 498, appeal dismissed 199 N.E.2d 166, 14 N.Y.2d 722, 250 N.Y.S.2d 68 (1964)). To permit the opinion of the Court

below to stand will jeopardize established state uniform motor vehicle registration systems. It also logically will tend to affect adversely analogous situations such as the establishment of the national monetary system by nullifying the offense of mutilation of national coins or currency by obliteration of the national motto, "In God We Trust", or the Latin phrase "e pluribus unum". 31 U.S.C.A. s. 324(a) (supp); 18 U.S.C.A. ss. 331, 333; see: Engel vs. Vitale, 370 U.S. 421, 440 n. 5, 8 L. Ed. 2d 601 n. 5 (1962).

CONCLUSION

It is respectfully submitted that the two constitutional questions presented are substantial, are of general importance, and that this Court should note probable jurisdiction and set the matter for briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX A

OPINION OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and
MAXINE MAYNARD,

Plaintiffs,

v. Civil Action No.
75-57

NEAL R. WOOLEY, individually
and as Chief of Police,
Lebanon, New Hampshire,
et al.,

O P I N I O N

COFFIN, Chief Judge. This is an action instituted pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the enforcement of NHRSA 262:27-c, which makes it a crime to obscure the words "Live Free or Die" on New Hampshire state license plates. Plaintiffs, George and Maxine Maynard -- both Jehovah's Witnesses -- state that they have political and religious objections to operating a motor vehicle which displays this motto, and they contend that the enforcement of the New Hampshire statute against them is contrary to the First and Fourteenth Amendments of the United States Constitution. George Maynard has, on three occasions in the past, been arrested, prosecuted, and convicted for violating the statute in question. The plaintiffs seek a declaratory judgment that, as applied to them, NHRSA 262-27-c is contrary to the United States

Constitution, an injunction against any future arrests and prosecutions, and an injunction requiring that, in future years, they be issued plates that do not contain the motto "Live Free or Die". The single district judge granted plaintiffs' prayer for a temporary restraining order enjoining future arrests and prosecutions. Because the action seeks an injunction against the enforcement of a state statute on the grounds of its unconstitutionality, a three-judge court was convened pursuant to 28 U.S.C. § 2281.

Since 1969, NHRSA 263:1 has required that all number plates for non-commercial vehicles, with some exceptions, shall have the state motto "Live Free or Die" embossed on them.[1] NHRSA 262:27-c (Supp. 1973), makes it a misdemeanor knowingly to obscure

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1. The New Hampshire state motto, which is reminiscent of the words of Patrick Henry -- "[B]ut as for me, give me liberty or give me death." -- derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils." Moore, A Life of General John Stark of New Hampshire 500 (1949). New Hampshire adopted "Live Free or Die" as its state motto in 1945, and in 1969, it passed a law requiring that, as of 1971, the motto must appear on most non-commercial plates.

the figures or letters on the license plates, and under New Hampshire law, the "letters" include the state motto. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).[2]

The plaintiffs own two automobiles. Beginning in March or April, 1974, they began covering the "Live Free or Die" on their license plates with tape -- usually reflective red tape. Beginning in late 1974 Mr. Maynard was arrested three times for violating NHRSA 262-27-c. His first arrest took place on November 27, 1974. He appeared in Lebanon District Court pro se on December 6, 1974 at which time he explained that he had religious objections

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2. In Hoskin, the New Hampshire Supreme Court held that NHRSA 262-27-c is not repugnant to either the due process clause or the First Amendment of the federal Constitution. In Hoskin, unlike the case at bar, the appellants did not contend that the act of covering the motto constituted symbolic speech that is protected by the First Amendment. Their First Amendment argument, which the New Hampshire Supreme Court rejected, was that the statute in question penalized them for exercising the right, recognized in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), to be free from a required affirmation of belief.

to displaying the motto on his license plate.[3] The court found him guilty and fined him $25, but suspended the fine during "good behavior". On December 28, 1974, Mr. Maynard was issued his second summons, and on January 31, 1975, he again appeared in court pro se. He was found guilty, fined $50, and sentenced to the Grafton County House of Corrections for six months. The court suspended the prison sentence. After trial, Maynard advised the court that he would have to refuse to pay the fines, which totalled $75, as a matter of religious conscience. The court then ordered him committed to the House of Corrections for a period of fifteen days. Prior to his incarceration, Mr. Maynard had on January 3, 1975 received his third summons for violating the statute. He was also found guilty by the court of this offense on January 31, 1975, but sentencing was continued. At oral argument, counsel for the state defendants informed us that, in this context, "continued for sentencing" is a final sentence under New Hampshire law. No collateral consequences will attach as

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3. Mr. Maynard states that his religious objection to displaying the state motto is that "[b]y religious training and belief, [he] believe[s] that [his] government -- 'Jehovah's Kingdom' -- offers everlasting life. It would be contrary to that belief to give up [his] life for the state, even if it meant living in bondage." He refuses to be coerced by the state to advertise a slogan which he finds morally, ethically, religiously, and politically abhorrent. Maxine Maynard testified that she shares her husband's views.

a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27-c at some time in the future.[4]

I. The Applicability of the Doctrine of Equitable Restraint

The state defendants contend that we are precluded from considering the constitutional merits of plaintiffs' claim by the doctrine of equitable restraint of Younger v. Harris, 401 U.S. 37 (1971). We disagree. Younger held that, in all but the most exceptional circumstances, a federal court should refuse to enjoin an ongoing criminal prosecution. Here, however, plaintiffs do not seek to enjoin a pending criminal prosecution. Their primary objective is to obtain declaratory and injunctive relief against future arrests and prosecutions. It is well established that where a federal plaintiff desires protection against threatened state prosecution of a constitutionally protected course of conduct in which he proposed to engage, a federal court can grant equitable relief. Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction); Steffel v. Thompson, 415 U.S. 452 (1974) (declaratory judgment). We believe that where, as here, the federal plaintiffs assert that enforcement of state laws against them would violate their First and Fourteenth Amendment rights and where, as here, state officials fully intend to

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4. The time for appeal from Mr. Maynard's convictions had expired before plaintiffs filed the present action on March 4, 1975.

enforce those laws, it is entirely appropriate that this court entertain plaintiffs' claim for injunctive relief.[5]

Defendants do not dispute that the Younger doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions. For this proposition, they rely upon Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). There, the Court held that the federal plaintiff was barred because it had chosen not to avail itself of its state appellate remedies, but, instead, had instituted suit in the federal court to obtain relief from a state court judgment. See also Ellis v. Dyson, 421 U.S. 426, 439-43 (1975) (Powell, J., dissenting). Huffman, however, is readily distinguishable. Huffman, like Younger, was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can result. Plaintiffs are not collaterally attacking Mr. Maynard's

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5. The court finds, as the state defendants concede, that both plaintiffs are under a sufficient threat of prosecution to present a justifiable controversy. See Steffel v. Thompson, supra at 459; Younger v. Harris, supra at 42.

state court convictions.[6] The relief they seek is purely prospective. Therefore, neither Younger nor Huffman requires that we stay our hand; indeed, since plaintiffs have demonstrated that they will suffer irreparable harm if we do not intervene and have stated a substantial constitutional claim, it is our responsibility to hear the case. Cf. Zwickler v. Koota, 389 U.S. 241, 247-48 (1967).

Even if the doctrine of equitable restraint barred Mr. Maynard's suit, we would still have to consider whether it bars Mrs. Maynard's action. She has an ownership interest in the Maynard family cars and, accordingly, is under a separate threat of prosecution. Cf. Steffel v. Thompson, supra at 459. This is not a situation "in which legally distinct

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6. A more plausible position for defendants to take would be that Mr. Maynard's state convictions bar litigation of the federal constitutional issues. Although more plausible, this argument too fails. The first circuit has held that a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial. Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975). Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdemeanor proceedings, collateral estoppel principles do not preclude this court from considering this issue.

parties are so closely related that they should all be subject to the Younger considerations which govern any of them" Doran v. Salem Inn, Inc., supra at 928. Doran suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management". Id. Here, however, each of the Maynards is acting on his or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other. The relationship between these plaintiffs is thus much closer to that presented in Steffel v. Thompson, supra.[7] In our view, therefore, Mr. Maynard's failure to appeal his state convictions could not bar Mrs. Maynard's federal action for protection from future state criminal prosecution.

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7. In Steffel, two persons engaging in antiwar handbilling outside a shopping center were threatened with state prosecution. One stopped, but the other continued and was arrested and charged with criminal trespass. While this state prosecution was pending, both filed a civil rights action in federal court seeking declaratory relief. The court held that while the one who had been arrested was barred by the Younger doctrine, the other remained free to present his federal claim. See Doran v. Salem Inn, Inc., supra at 928.

II. The Constitutional Merits

Plaintiffs' principal contention is that the New Hampshire statutes cannot be enforced against them consistent with the First Amendment of the federal Constitution, which, of course, is applicable to the states.[8] They maintain that their act of masking over the words "Live Free or Die" is constitutionally immune from state regulation because this act was done to avoid a required affirmation of belief, under the rule of West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); and because their act constituted symbolic speech, as to which New Hampshire cannot demonstrate a sufficient interest to regulate. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Since we accept plaintiffs' contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.[9]

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8. Plaintiffs also rely upon the due process and equal protection clauses of the Fourteenth Amendment. Because plaintiffs' First Amendment claim is dispositive, we do not address these alternate claims.

9. Judge Bownes would also rest our decision on the ground that NHRSA 262:27-c violates plaintiffs' right to be free from "compelled affirmations of belief".

We begin by identifying the public and private interests that are at stake. Although the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. Whatever else may be said about the motto "Live Free or Die", it expresses philosophical and political ideas. Plaintiffs' desire

not to be aligned with these ideas falls within the ambit of the First Amendment.[10]

The state interests promoted by the requirement that New Hampshire passenger cars display license plates bearing this motto are essentially twofold. First, the state believes that the dissemination of the motto and the association of it with New Hampshire serves a number of values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism. Second, the presence of the motto on the plates aids in the identification of New Hampshire passenger cars. To permit individuals to mask the "Live Free or Die" on their plates would frustrate the

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10. The defendants contend that the significance of "Live Free or Die" is primarily historical and that the motto is, in any event, so ambiguous that any First Amendment interest plaintiffs assert is de minimis. We do not deny the historical significance of New Hampshire's motto, but this significance is necessarily related to the philosophical and political ideas that have been so important in American history, see note 1 supra, but which plaintiffs are not compelled to endorse. Although the vast majority of, if not all other, state mottoes seem to lack ideological content, "Live Free or Die" has obvious political and philosophical significance for many. The New Hampshire motto may not be as politically charged as other slogans that might be placed on license plates, e.g., "Amnesty Now", but we can conceive of no neutral principle which would permit us to distinguish "Live Free or Die" from such others.

attainment of these objectives. Whether these state interests are sufficient to justify the restriction on plaintiffs' activity will be considered below.

Plaintiffs' contention is that their act of masking the "Live Free or Die" on their license plates constitutes symbolic speech and that the New Hampshire defacement statute, NHRSA 262:27-c, is invalid as applied to them because it is not supported by any state interests that are sufficiently important to justify the restriction of protected expression. We agree.

This claim is based principally on two recent opinions of the United States Supreme Court invalidating state limitations on the exercise of "symbolic speech". In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held it a violation of the First and Fourteenth Amendments for public school officials to discipline students for wearing black armbands to school in protest of United States involvement in Vietnam. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), the Court overturned appellant's conviction for "improper use" of an American flag where, in May, 1970, shortly after the invasion of Cambodia and the shootings at Kent State University, appellant had taped a peace symbol onto an American flag and hung it upside down from his window. See Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974). In each case, the Court concluded that the claimant's act was sufficiently imbued with the elements of communication to be within

the ambit of the First Amendment and that the state interests relied upon were insufficient to justify the restrictions on the protected expressions.

We are satisfied that plaintiffs' acts of covering the motto "Live Free or Die" constitutes symbolic speech within the meaning of Tinker and Spence. The use of reflective red tape to mask the motto is clearly intended to call attention to the fact that the motto has been obscured and thereby to communicate plaintiffs' disagreement with it. The context of plaintiffs' actions, which is important in determining their communicative quality, see Spence v. Washington, supra at 410, is such that plaintiffs' message is likely to be readily understood. New Hampshire citizens are well aware that the motto "Live Free or Die" appears on the license plates of passenger cars registered in that state, and the likelihood is great that they will interpret plaintiffs' obliteration of the motto as an expression of their conscientious objections to its implications.[11] Since plaintiffs' actions

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11. There is, moreover, evidence in the record that, at least since the decision of the New Hampshire Supreme Court in State v. Hoskin, supra, handed down in 1972, New Hampshire citizens have been generally aware that individuals like the plaintiffs have been covering the "Live Free or Die" on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good. This consideration supports our conclusion that the likelihood is great that observers will understand the significance of plaintiffs' acts.

are intended as expression and readily perceived as such, we conclude that they are seeking to enjoin "a prosecution for the expression of an idea through activity." Spence v. Washington, supra at 411.[12]

Having found symbolic speech, we now consider the sufficiency of New Hampshire's justifications for the statute. In United States v. O'Brien, 391 U.S. 367 (1968), upholding the respondent's conviction for knowing destruction of his draft card, the Supreme Court developed a four-part test for determining whether a government regulation restricting the freedom of expression protected by the First Amendment is justified. The Court stated, id. at 377:

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12. Defendants contend that it will follow from our holding today that individuals will be free to cover up the mottoes on any state's license plate if they can conceive of some possible political or philosophical opposition to the motto. We reject this suggestion. Plaintiffs have succeeded in establishing that symbolic speech is involved in this case because they have shown not only that they intended to convey a message by their act but also that the message was likely to be understood. They were able to make this latter showing principally because the New Hampshire motto itself possesses obvious political and philosophical significance. We doubt that symbolic speech could be shown in this type of a case when the motto has no such significance.

may perhaps single out certain messages for special protection when they appear on public property, see Spence v. Washington, supra at 408-09, Spence teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the O'Brien test. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1506-08 (1975). In Spence the Court indicated that the state interest in preventing interruption of the set of messages conveyed by the flag was directly related to the suppression of free expression. 418 U.S. at 412-14 & n. 8. The fact that plaintiffs' act, unlike that of the defendant in Spence, is the only practical alternative to displaying the motto indicates that the statute and the suppression of freedom of expression are even more closely related in the present case than in Spence.

Second, even if the statute's other objective -- requiring that "Live Free or Die" appear on all cars in order to facilitate identification of New Hampshire passenger vehicles -- might be considered unrelated to speech, this purpose clearly fails the fourth requirement of O'Brien: the defacement statute's effect on plaintiffs' First Amendment freedoms is certainly "greater than is essential to the furtherance of that interest". It cannot be seriously contended that the state of New Hampshire has, to use the words of O'Brien, supra at 381, no alternative means that would more precisely and narrowly assure preservation of its interest in

facilitating vehicle identification. Surely it need not structure its system of vehicle identification so that individuals will have to display a motto to which they are philosophically opposed. That the presence of this motto on the license plates is required for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto "Live Free or Die".[13]

Since New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction

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13. Defendants suggest that, whatever the merits of placing "Live Free or Die" on the license plates, for the present the motto is needed to distinguish plaintiffs' automobile from automobiles that have no motto on their plates but have the same identification number. However, the state defendants have not shown that any New Hampshire non-passenger motor vehicles have the same identification number as plaintiffs' and there is evidence in the record suggesting that none do. So, even assuming arguendo that this would be a sufficient justification, defendants have not satisfied their burden.

on plaintiffs' constitutionally protected expression,[14] we hold that as applied to plaintiffs NHRSA 262:27-c abridges the rights protected by the First and Fourteenth Amendments.

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14. The fact that defendants have not satisfied the O'Brien test is not necessarily dispositive of the statute's invalidity. See Spence v. Washington, supra at 414 n. 8; Ely, supra at 1496-97. It is implicit in the foregoing discussion, however, that neither of the interests New Hampshire has identified is sufficiently weighty to justify the interference with plaintiffs' protected expression.

Defendants also argue that the New Hampshire defacement statute effects such minimal interference with the values protected by the First Amendment that the state's otherwise insufficient justifications should be deemed sufficient for this case. The core of defendants' submission is that plaintiffs have equally effective alternative means of conveying their message: they could place bumper stickers near the plates which express their disagreement with the motto. We reject this argument. Spence v. Washington, supra, summarily rejected the contention that the free expression claim should fail since it was "miniscule and trifling" in view of the thousands of other available means of disseminating the views. One may not have the liberty of expression in an appropriate place abridged on the ground that the message could be conveyed in an alternative way. 418 U.S. at 411 n. 4. See Cohen v. California, 403 U.S. 15 (1971); Schneider v. State, 308 U.S. 147, 163 (1939).

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

We find that the defacement statute fails to meet two of the four components of the O'Brien test. The state has asserted that the statute serves to purposes: facilitating vehicle identification and promoting appreciation of history, state pride, individualism, and tourism. The effectuation of these objectives is within the constitutional power of the state and furthers important and substantial governmental interests. These justifications, however, fail to satisfy the third and fourth requirements of the O'Brien test.

The defacement statute furthers the New Hampshire interest in promoting appreciation of history, state pride, and tourism by preventing individuals from covering over the motto and thereby ensuring the widest possible dissemination of of the message contained therein. This interest is directly related to the suppression of free expression within the meaning of O'Brien. Although a government

III. Relief

For the reasons stated above, defendants are enjoined from arresting and prosecuting plaintiffs at any time in the future for covering over that portion of their license plates that contains the motto "Live Free or Die". Although there is evidence that New Hampshire could easily issue plaintiffs license plates that do not contain the motto -- the state presently manufactures vanity plates to order at a cost of $5 -- we decline to issue an injunction ordering the state officials to do so. The relief we have ordered should fully protect plaintiffs in the exercise of their First Amendment rights, and we would be ill-advised to interfere further with the operation of New Hampshire's system of vehicle identification.

So ordered.

/s/ Frank M. Coffin
U. S. Circuit Judge

/s/ Edward T. Gignoux
U. S. District Judge

/s/ Hugh H. Bownes
U. S. District Judge

Dated at Concord, New Hampshire
on February 9, 1976

JUDGMENT ON DECISION

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

GEORGE MAYNARD and MAXINE MAYNARD	)	
vs.	)	Civil Action No. 75-57
NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire, et al	)	JUDGMENT

This action came on for hearing before the Court, Honorable Frank M. Coffin, Honorable Edward T. Gignoux, and Honorable Hugh H. Bownes, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with OPINION entered February 9, 1976.

Dated at Concord, New Hampshire this 9th day of February, 1976.

/s/ William H. Barry, Jr.
Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

George Maynard and Maxine Maynard	)	
vs.	)	Civil Action
Neal R. Wooley, individually and as Chief of Police, Lebanon, New Hampshire; Paul A. Doyon, individually and as Director of the New Hampshire State Police; Frederick N. Clarke, Jr., individually and as Commissioner of the New Hampshire Department of Motor Vehicles	)	No. 75-57

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Neal R. Wooley, Paul A. Doyon, and Frederick N. Clarke, Jr., the Defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting declaratory and injunctive relief entered in this action on February 9, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Robert V. Johnson, II
The State of New Hampshire
Office of the Attorney General
Robert V. Johnson, II
Assistant Attorney General
State House Annex
Concord, New Hampshire 03301
603-271-3671

Counsel for the Defendants
February 13, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1976, copies of this Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to Richard S. Kohn, Esquire, 3 Pleasant Street, Concord, New Hampshire 03301, and R. David DePuy, Esquire, 40 Stark Street, Manchester, New Hampshire 03105, counsel of record for the Plaintiffs, and R. Peter Decato, Esquire, National Bank Building, Lebanon, New Hampshire 03066, counsel of record for Defendant Neal R. Wooley. I further certify that all parties required to be served have been served.

/s/ Robert V. Johnson, II
The State of New Hampshire
Office of the Attorney General
Robert V. Johnson, II
Assistant Attorney General
State House Annex
Concord, New Hampshire 03301
603-271-3671

Counsel for the Defendants

APPENDIX C

United States Constitution: First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition to government for a redress of grievances."

United States Constitution: Fourteenth Amendment, §1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire RSA 263:1 (supp) "Number Plates"

> "Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or

> "plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto "live free or die" written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c (supp) "Misuse of Plates"

> "Any person who knowingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."